

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Crego Eff. Savant & Walling
77-1373

To be argued by
RHONDA FIELDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1373

UNITED STATES OF AMERICA,

Appellee,

—against—

SALVATORE MOGAVERO,

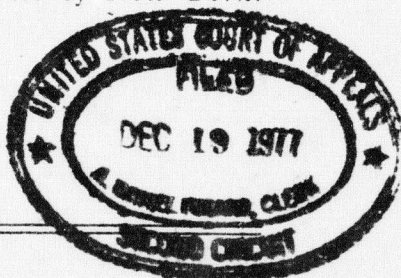
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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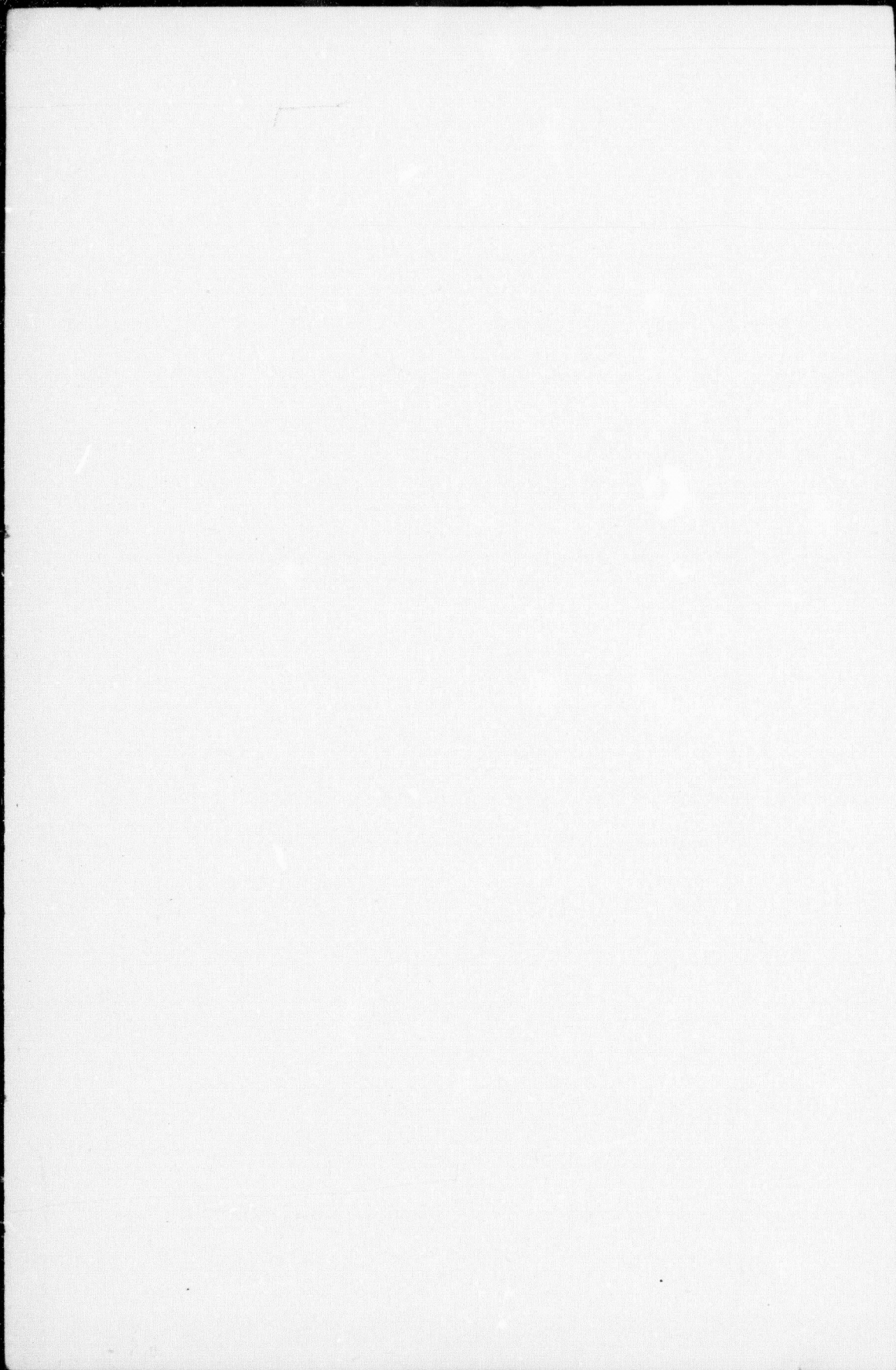


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Evidence	2
The Defendant's Evidence	7

ARGUMENT:

POINT I—The evidence against appellant was sufficient to support his conviction on both the possession and conspiracy counts; and the statements of co-conspirators were properly admitted into evidence	7
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A. Appellant's participation in the conspiracy was proved by a fair preponderance of the evidence independent of the hearsay statements	8
---	---

B. There was no error in the admission of co-conspirator statements and acts done "in furtherance of the conspiracy"	10
--	----

C. The evidence was sufficient to support the jury's verdict on both counts	12
---	----

POINT II—Appellant's Remaining Contentions Are Without Merit	16
--	----

CONCLUSION	17
------------------	----

TABLE OF CASES

<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	11
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	12, 16
<i>Holland v. United States</i> , 348 U.S. 121 (1954)	14

	PAGE
<i>Krulewitch v. United States</i> , 336 U.S. 440 (1949) ..	11
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946)	11
<i>United States v. Birnbaum</i> , 337 F.2d 490 (2d Cir. 1964)	11
<i>United States v. Bowles</i> , 428 F.2d 592 (2d Cir.), cert. denied, 400 U.S. 928 (1970)	14
<i>United States v. Cirillo</i> , 468 F.2d 1233 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973)	11
<i>United States v. Cirillo</i> , 499 F.2d 872 (2d Cir. 1974)	9, 15
<i>United States v. Daley</i> , Docket No. 77-1262 Slip op. 109 (2d Cir., Oct. 20, 1977)	8
<i>United States v. DeNoia</i> , 451 F.2d 979 (2d Cir. 1971)	14
<i>United States v. DiStefano</i> , 555 F.2d 1094 (2d Cir. 1977)	9
<i>United States v. Falley</i> , 489 F.2d 33 (2d Cir. 1973)	12
<i>United States v. Fantuzzi</i> , 463 F.2d 683 (2d Cir. 1972)	12
<i>United States v. Frattini</i> , 501 F.2d 1234 (2d Cir. 1974)	12
<i>United States v. Glasser</i> , 443 F.2d 994 (2d Cir. 1971)	14
<i>United States v. Jones</i> , 308 F.2d 26 (2d Cir. 1962)	15
<i>United States v. Kahaner</i> , 317 F.2d 459 (2d Cir.), cert. denied, 317 U.S. 836 (1963)	16
<i>United States v. Lamont</i> , Docket No. 77-1118 Slip op. 6337 (2d Cir., Oct. 28, 1977)	16
<i>United States v. Lopez-Ortiz</i> , 492 F.2d 109 (5th Cir. 1974)	14

	PAGE
<i>United States v. Marrapese</i> , 486 F.2d 918 (2d Cir. 1973)	12
<i>United States v. Oliva</i> , 497 F.2d 130 (5th Cir. 1974)	8
<i>United States v. Siragusa</i> , 450 F.2d 592 (2d Cir. 1971)	14
<i>United States v. Stanchich</i> , 550 F.2d 1294 (2d Cir. 1977)	1
<i>United States v. Suarez</i> , 487 F.2d 236 (5th Cir. 1973)	14
<i>United States v. Torres</i> , 503 F.2d 1120 (2d Cir. 1974)	13
<i>United States v. Tyler</i> , 505 F.2d 1329 (5th Cir. 1975)	8
<i>United States v. Vaught</i> , 485 F.2d 320 (4th Cir. 1973)	12
<i>United States v. Warren</i> , 453 F.2d 738 (2d Cir. 1972)	14



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1373

UNITED STATES OF AMERICA,

—against—

SALVATORE MOGAVERO,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Salvatore Mogavero, appeals from a judgment of conviction entered on August 19, 1977, in the United States District Court for the Eastern District of New York (Mishler, *CJ.*) after a jury trial convicting him of two counts of an indictment charging him with possession of methaqualone with intent to distribute (Count Four) and a conspiracy to commit that offense (Count One) (Title 21 U.S.C. § 841(a) (1) and Title 18, U.S.C. § 2; and Title 21 U.S.C. § 846). He was sentenced to concurrent terms of 2 years imprisonment to be followed by concurrent special parole terms of 3 years.

On this appeal it is claimed; (1) that appellant's participation in the conspiracy was not proved by a "fair preponderance" of the evidence independent of hearsay statements; (2) that the district court erred in admitting into evidence certain co-conspirator statements and acts;

and (3) that the evidence of appellant's guilt was insufficient as to both the possession count and the conspiracy count.

Statement of Facts

The Government's Evidence

Paul Sennett, a Special Agent with the Drug Enforcement Administration, testified that on September 1, 1976, while acting in an undercover capacity, he met with one Irwin Bell¹ at a restaurant in Manhattan. Bell made arrangements for Sennett to meet an individual named "Freddie" for the purpose of purchasing 5,000 methaqualone tablets. (11-14).² As directed, Agent Sennett proceeded to a White Castle parking lot in Queens where he met Frederick Moskowitz and another individual. At this time the transaction was postponed until the next day, and Moskowitz was given a telephone number at which to contact Sennett. (14-15). The next day Moskowitz called Sennett, and they again met at the White Castle parking lot, where Moskowitz sold Sennett 1,000 methaqualone tablets and received \$2,000. (15).

On September 15, 1976, Moskowitz called Sennett and stated that he had 2,500 tablets for sale at \$1.90 per pill. Sennett met Moskowitz at the White Castle parking lot and then drove with him to the Versailles Apartments in Queens. Moskowitz entered the building and returned. He stated that only 1,000 tablets were available at this time but that the "boyfriend" of the woman to whose apartment he had gone would have an additional 1,500

¹ Irwin Bell, Frederick Moskowitz and Peter D'Agostino were indicted co-conspirators who pled guilty prior to trial.

² The numbers in parenthesis refer to the pages of the trial transcript as set out in the Appellant's Appendix.

the next day. Moskowitz further stated that later in the week there would be an additional 10,000 pills and that they were coming from Brooklyn. Sennett agreed to purchase the 1,000 tablets. Moskowitz got the tablets and gave them to Sennett, who paid him \$1,900. (18-20).

On November 24, 1976, Moskowitz again contacted Sennett and stated that he had 50,000 methaqualone tablets available for sale. Arrangements were made to meet at the White Castle parking lot in Queens. Sennett met Moskowitz at the parking lot and then went with him to the Bayside Bowling Lanes where Moskowitz was to receive a call from the "people with the pills." After a brief telephone conversation with an individual named "Peter", Moskowitz asked to be shown the money. Sennett contacted Special Agent Torre, who arrived a few minutes later with a "flash roll" of \$75,000. (22-23).

Special Agent Torre testified that after showing Moskowitz the money, Torre accompanied him inside the bowling alley. Moskowitz let Torre speak with an individual on the telephone. This individual, who identified himself as "Peter", stated that the deal would be more easily transacted in Brooklyn. Peter also stated that he only had 25,000 pills but that he would have the other 25,000 by the time they arrived in Brooklyn. This proposal was agreed to and Torre sent Sennett to Brooklyn with Moskowitz. (65, 67-69).

Sennett testified that he thereupon followed Moskowitz to a Carvel Ice Cream store parking lot on Kings Highway and McDonald Avenue in Brooklyn. They were met there by an individual driving a 1973 white Cadillac who was introduced as Peter D'Agostino. D'Agostino said the pills were "only a few minutes away" and asked to be paid, but Sennett refused to call for the money until shown the pills. D'Agostino agreed and went to make a telephone call. (24-25).

Special Agent Ronald Catanese who was part of the surveillance team at that time, observed the individual who drove the white Cadillac, D'Agostino, getting in and out of his car, talking to several people. Catanese testified that at one point D'Agostino met a man who was wearing a red sweatshirt and overalls and had a beard. D'Agostino and this person walked up the block and talked. They then returned, walked by the car in which Catanese was parked and crossed the street behind him. A few minutes later Catanese observed a red Plymouth drive by and pull into the Carvel parking lot. The bearded person wearing the red sweatshirt and overalls got out and met with Sennett and the others. (95-97).

Agent Sennett testified, with respect to this transaction, that when an old red Plymouth pulled into the Carvel parking lot D'Agostino told him, "Well, the pills are here." As Sennett, D'Agostino, and Moskowitz walked to the car, Moskowitz stated, "That's Sal, that's the guy with the pills." (25). Agent Sennett further testified that D'Agostino then got into the passenger side of the car and talked with the driver "Sal" a minute or two. They got out; Sal walked back to the trunk, stood next to Sennett and opened the trunk. Sennett saw tan plastic trash bags which were knotted. When he attempted to open the bags Sal got nervous, slammed the trunk down and drove away at a fast rate of speed. Sennett described the driver Sal as about 5' 8" with dark hair, a full beard, wearing dark work pants and a red sweatshirt. Sennett stated that he stood right next to Sal at the trunk of the car and was able to observe him for approximately 35 to 40 seconds. Sennett identified appellant Salvatore Mogavero as that individual. (26-28).

After the red car left, Moskowitz and D'Agostino told Sennett that the pills were in Sal's car. They stated that Sal did not like to deal in this manner and that "he didn't want to bring [that] many pills out on the street." (33). Sennett, thereupon, asked D'Agostino to go to Sal and try

to work out an arrangement so that they could still "do the deal" that evening. D'Agostino left and returned. He stated that he had to go to a discotheque that he owned but that he was going to try to convince Sal to "bring the pills back out on the street." D'Agostino later returned and told Sennett that Sal would not transfer the pills in this manner. D'Agostino proposed that he "front" \$6,000 of his own money, purchase the pills from Sal and bring them back to Sennett. Sennett would repay the money and then D'Agostino would repeat the process until all 50,000 pills were purchased. (33-35).

At this point Special Agent Torre drove up. Torre testified that Moskowitz introduced Peter D'Agostino to him. Moskowitz told Torre, "Your man blew the deal . . . The pills were in the trunk of the car and he wanted to play with them and my man got scared and he took off." (69-70). Moskowitz and D'Agostino then proposed to Torre that the sale be transacted in the manner which had been previously described to Sennett. Torre rejected the proposal. (70-71).

Following this conversation, Agent Sennett testified, Moskowitz and D'Agostino talked with him. They stated that the transaction would have to be postponed; they also said that they felt there were possibly police in the area and that Sal felt police were in the area. (35).

Special Agent Robert Baker testified that he and his partner were on moving surveillance on November 24, 1976. He observed a red car, with license plate number 375XVJ, pull out of the Carvel parking lot. They then followed the car to 1711 Dahill Road, where it was parked and the driver got out. (76). It was stipulated at trial that the above described car was registered to appellant's wife, Franca Mogavero of 1711 Dahill Road, Brooklyn. (79-80, 147). Agent Baker got out of his car and followed the driver to a candy store where he observed him making a telephone call. This individual was described as short and stocky with a beard and wearing a red warm-up shirt

and dark trousers. At trial, Baker identified Salvatore Mogavero as the individual he had observed. (76-78). Agent Baker further testified that later that night, when returning to meet the surveillance team, he and his partner drove through Dahill Road where they observed a 1973 white Cadillac double parked in front of 1711 Dahill Road. He identified this car as being the same white Cadillac which had been parked across from the Carvel Ice Cream Store earlier in the surveillance. (79).

Agent Sennett testified that, following the November 24 meeting, Moskowitz contacted him twice in January to arrange a sale of 25,000 methaqualone tablets. The actual sale was to be postponed until Peter D'Agostino returned from a skiing trip. (36-37). On February 2, 1977 Moskowitz called Sennett, and they arranged to meet in the parking lot of the Bayside Shopping Plaza in Queens. Sennett met Moskowitz and they walked to the Versailles Apartments, where they met Peter D'Agostino in the lobby. D'Agostino stated he had only 20,000 pills rather than the 25,000 which had been agreed upon. He further said he would only sell 10,000 at a time. D'Agostino showed the pills to Sennett, who then left to get his car and the money. When Sennett returned, Moskowitz came out of the Versailles Apartments with the pills in a satchel. Moskowitz was thereupon arrested. (37-40).

Special Agent Ronald Catanese testified that he was also a part of the back-up surveillance team on February 2, 1977. Following the arrest Moskowitz was taken into the building to where the doorman was. Catanese was then waiting in his car, which was parked on the circular driveway near the entrance of the Versailles Apartments. While waiting in the car, Catanese observed an individual walk by and then return approximately 15 to 20 seconds later. Catanese further testified that later in the evening he returned to the Drug Enforcement Administration office and recognized there, in an agent's office, the same man who had walked by him at the Versailles Apartments.

Catanese was then informed that this individual was appellant Salvatore Mogavero. (98-101).

The Defendant's Evidence

The defendant Salvatore Mogavero testified in his own behalf. He stated that he had no beard in November of 1976 and that he was not the person at the Carvel parking lot on November 24, 1976. (122) He further stated that he often lent his car to people with whom he worked. (120-121). Mogavero also testified that on February 2, 1977, Peter D'Agostino had dropped him off at a barbership to get his hair cut. (125).

Mogavero also called witnesses who testified to his good character, testified that he did not wear a beard around November 1976, and that he often lent his car to people on his job.

A R G U M E N T

POINT ONE

The evidence against appellant was sufficient to support his conviction on both the possession and conspiracy counts; and the statements of co-conspirators were properly admitted into evidence.

Appellant Mogavero argues that the evidence of guilt was insufficient as to both the possession and conspiracy counts of the indictment. In support of these contentions, appellant argues that the Government failed to prove his membership in the conspiracy by evidence apart from the hearsay statements of co-conspirators and, thus, failed to lay a proper foundation for the admission of co-conspirator statements. With respect to his conviction for possession, appellant argues further that, even in

light of all the proof, including hearsay statements of co-conspirators, the evidence was insufficient. These contentions are without merit.

A. Appellant's participation in the conspiracy was proved by a fair preponderance of the evidence independent of the hearsay statements.

Appellant argues that, without reference to hearsay statements of co-conspirators, the facts elicited concerning his participation in the November 24, 1976 and February 2, 1977 transactions did not properly establish his participation in the conspiracy, but only associated him to the conspiracy by "mere presence" at the site of unlawful transactions. It is well-settled law in this Circuit that co-conspirator declarations are admissible if the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of the hearsay utterances. *United States v. Daley*, Docket No. 77-1262 Slip op. 109, 120 (2d Cir., Oct. 20, 1977); *United States v. Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977).³ Here, the government met that burden.

³ Appellant cites *United States v. Tyler*, 505 F.2d 1329 (5th Cir., 1975) apparently for the proposition that the government failed to prove his participation in the conspiracy by independent evidence. As *Tyler* indicates (*id.* at 1332), citing *United States v. Oliva*, 497 F.2d 130 [5th Cir. 1974], the test in the Fifth Circuit is whether the government has through independent evidence established a *prima facie* case of conspiracy. *Oliva*, specifically noted (497 F.2d at 133 n.3) that the Second Circuit has expressly refused to adopt the "prima facie" test for admissibility of co-conspirator statements and uses the "fair preponderance" test, which that Fifth Circuit panel characterized as less stringent. 497 F.2d at 134 n.5, accord *United States v. Stanchich*, *supra*, 550 F.2d at 1299 n.4.

The government submits, however, that even under the Fifth Circuit "prima facie" test the evidence, considered in the light most favorable to the Government, proved appellant's knowing participation in the conspiracy.

While mere association or mere presence alone may sometimes be insufficient to satisfy the "fair preponderance" test, *United States v. Cirillo*, 499 F.2d 872, 883, 886 (2d Cir. 1974), the evidence here, viewed in the light of all circumstances, went beyond mere association or presence and strongly suggested appellant's actual complicity in the conspiracy. It is settled, moreover, that willful participation in a conspiracy may be established by entirely circumstantial evidence. See *United States v. DiStefano*, 555 F.2d 1094, 1103 (2d Cir. 1977); *United States v. Cirillo*, *supra*, 499 F.2d at 883. In the instant case appellant's participation in the conspiracy was more than amply proved by evidence other than the hearsay utterances of co-conspirators. Thus, for example, on November 24, 1976, appellant arrived at the meeting place for the planned transaction. He talked with D'Agostino for a while, walked around the area with him (presumably to look things over) and then returned driving a red Plymouth. He spoke privately in that car with D'Agostino and then proceeded to the car trunk and opened it to display its contents to Special Agent Sennett. Inside were a number of knotted plastic trash bags. When Sennett attempted to open the bags to view the merchandise, appellant became nervous, slammed the trunk down and drove away at a high rate of speed. Moreover, non-hearsay evidence also showed that appellant was seen walking around the Versailles Apartments on February 2, 1977, when Moskowitz was arrested while attempting to sell a large number of methaqualone tablets to Agent Sennett. These facts, taken together, obviously indicate that appellant was actively involved in the conspiracy.

Appellant's activities on November 24, 1976 are clearly distinguishable from cases involving "mere association" or "mere presence". In *United States v. Cirillo*, *supra*, 499 F.2d at 886, for example, the only independent non-hearsay evidence offered against the defendant Gaber was that on two occasions he was observed in the company

of the prospective narcotics purchaser and that on a third occasion he knew the name of the seller the purchaser was to meet. In its finding that there was insufficient non-hearsay evidence of Gaber's membership in the conspiracy to support the admission of co-conspirator statements, the Court stated that there was no evidence that narcotics were discussed in Gaber's presence, nor that he acted furtively or lied when questioned, nor that he committed an act suggesting his association with Cesare was illicit in nature. Lacking any of these factors, the evidence failed to show that Gaber knew a narcotics sale was planned. Appellant Mogavero, on the other hand, was not merely accompanying a participant in the conspiracy. On November 24, he arrived alone to make the delivery; he cased the area beforehand; he became nervous and sped away when Sennett took time attempting to open the garbage bags. In February, again, Mogavero arrived at the Versailles Apartments alone, and shortly thereafter left the area where one of the co-conspirators had been arrested. All of these activities clearly suggest appellant Mogavero's knowledge that he was involved in an illicit activity.

In short, there can be no question that appellant's participation in the conspiracy was proved by a fair preponderance of the evidence independent of the hearsay utterances.

B. There was no error in the admission of co-conspirator statements and acts done "in furtherance of the conspiracy."

In arguing that the trial court erred by allowing co-conspirator statements into evidence, appellant points particularly to the admission, over defense objection, of the statements made by co-conspirators Moskowitz and D'-Agostino subsequent and prior to the arrival of appellant

at the Carvel parking lot on November 24, 1976. Appellant additionally asserts that methaqualone tablets purchased and seized from the co-conspirators were improperly admitted into evidence.

As noted above, once a defendant's participation in the conspiracy has been proved by a fair preponderance of the evidence independent of the hearsay statements, co-conspirator statements made during the pendency of and in furtherance of the conspiracy are admissible into evidence. *Dutton v. Evans*, 400 U.S. 74, 81 (1970); *Krulewitch v. United States*, 336 U.S. 440, 443-444 (1949); *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964). Additionally, once found to be a member of a conspiracy, an individual is criminally responsible for all acts done in furtherance of the conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 646-647 (1946); *United States v. Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

There can be no question that the statements of Moskowitz and D'Agostino were made during the course of the conspiracy and in furtherance of the conspiracy. All of the co-conspirator statements offered concerned either preparation and negotiation for deals or occurred during the course of the co-conspirators' dealings with Agent Sennett. The November 24 co-conspirator statements made after appellant Mogavero drove away from the Carvel parking lot, for example, related to Moskowitz' and D'Agostino's attempts to salvage the sale.

Equally, there can be no question that the three actual sales of methaqualone tablets by Moskowitz and D'Agostino were acts done in furtherance of the conspiracy. The fact that appellant was not present during the actual sales does not relieve him from being bound by the acts and statements made in furtherance of the conspiracy. See *Pinkerton v. United States*, *supra*, 328 U.S. at 646

(while a conspiracy is pending, the act of one conspirator in furtherance of the object of the conspiracy is considered the act of all of them). Moreover, all of the evidence, considered together, clearly indicated that appellant—referred to by his co-conspirators as “the guy with the pills”—was the principal (and perhaps sole) supplier for D’Agostino and Moskowitz. In sum, the pills purchased during these sales, were, therefore, directly relevant to the issues of the trial, including appellant’s involvement in the conspiracy.⁴

C. The evidence was sufficient to support the jury’s verdict on both counts.

1. Viewing all the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), there can be no real dispute that appellant’s guilt of the conspiracy was proved beyond a reasonable doubt. The evidence clearly showed that appellant entered into an illegal conspiracy with

⁴ The admission into evidence of the pills purchased from Moskowitz and D’Agostino was therefore completely distinguishable from the evidence introduced in *United States v. Falley*, 489 F.2d 33, 37-38 (2d Cir. 1973), on which appellant relies (Br. 19). There, a suitcase admitted into evidence had nothing to do with the crime with which the defendant was charged.

The other cases on which appellant relies also fail to support his various assertions regarding errors in admitting evidence here. In *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973), for example, pre-conspiracy acts were improperly admitted into evidence; *United States v. Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972), involved the issue whether, absent independent non-hearsay proof of the defendant’s membership in the conspiracy, a hearsay statement was admissible as an adoptive admission; *United States v. Frattini*, 501 F.2d 1234, 1235-1236 (2d Cir. 1974), dealt with inadmissible hearsay notes on a laboratory report submitted to the jury.

Moskowitz and D'Agostino to sell methaqualone tablets; that appellant was the supplier of the tablets; and that one attempted and three actual sales were carried out pursuant to that conspiracy.

Appellant misplaces his reliance on *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974). There, the defendant claimed that evidence as to his involvement in the conspiracy was insufficient because only a "single act" was proved. The *Torres* Court, however, noted that "where the 'single act' is such as to justify an inference of knowledge of the broader conspiracy, that is sufficient" (*Id.* at 1123). The court contrasted the difference in impact of a "single act" or transaction in the context of a large, multiparty conspiracy where the act is a minor part of the whole, to the impact of a "single act" in the context of a less broad conspiracy with fewer participants and transactions. The Court stated that "it is the qualitative nature of the act or acts constituting the single transaction . . . viewed in the context of the entire conspiracy which will determine whether an inference can be drawn as to the actor's knowledge of the scope of the conspiracy" (*Id.* at 1124). The conspiracy in appellant's case was a small one being comprised of only two main participants other than appellant—i.e., Moskowitz and D'Agostino. Additionally, there were only four transactions, all of which were simple in nature. Appellant took a leading role in at least one major transaction (which was aborted), and on the basis of all the evidence strong inferences can be drawn that he was the supplier in other transactions as well. Indeed, in view of the small scope of the conspiracy, a more than reasonable inference of appellant's knowing participation can be drawn solely from his presence, his arrival as "the man with the pills", his attempted delivery, and surreptitious and nervous actions during the November transaction.

United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971).⁵

2. Without objecting to any of the relevant instructions, appellant argues that there was insufficient evidence from which a jury could conclude that he possessed methaqualone tablets on November 24, 1976.

We submit, however, that there was sufficient circumstantial evidence from which the jury could conclude beyond a reasonable doubt that appellant possessed methaqualone.

It is well settled that circumstantial evidence may be accorded the same weight and probative value as direct evidence *United States v. Bowles*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970) and may be sufficient by itself to sustain a conviction. *United States v. Glasser*, 443 F.2d 994, 1006-1007 (2d Cir. 1971). Al-

⁵ Appellant cites *United States v. Suarez*, 487 F.2d 236 (5th Cir. 1973) and *United States v. Lopez-Ortiz*, 492 F.2d 109 (5th Cir. 1974), in support of the proposition that mere association or presence and flight alone are not sufficient to establish participation in a conspiracy. While it is the position of the government that much more than mere association was shown in appellant's case, it should be noted that the Fifth Circuit test for sufficiency of circumstantial evidence appears to be different from that of the Second Circuit. Thus, in *Suarez*, 487 F.2d at 240, the court stated that circumstantial evidence may support a conviction if sufficiently strong "in the absence of any other reasonable hypothesis"; and in *Lopez-Ortiz*, 492 F.2d at 115, the court stated that mere presence and flight were insufficient because a jury "cannot reasonably conclude that such evidence excludes every reasonable hypothesis save that of guilt."

The Second Circuit, however, does not follow the rule that circumstantial evidence must exclude all reasonable inferences other than guilt. See, e.g. *United States v. Warren*, 453 F.2d 738, 745 (2d Cir. 1972); *United States v. Siragusa*, 450 F.2d 592, 596 (2d Cir. 1971) *Accord: Holland v. United States*, 348 U.S. 121, 139-40 (1954).

though the methaqualone tablets in Mogavero's car trunk were not seized or seen by Agent Sennett, there was sufficient circumstantial evidence from which a jury could conclude beyond a reasonable doubt that the bags in appellant's car trunk contained methaqualone tablets. See *United States v. Cirillo*, 449 F.2d at 888. This evidence consisted (among other things) of the following: (1) on November 24, 1976, Moskowitz arranged a sale for 50,000 tablets with Agent Sennett; (2) when Agent Torre talked with "Peter" (obviously, D'Agostino) on the phone, Peter explained that he had only 25,000 tablets but would have the full amount when they reached Brooklyn; (3) appellant Mogavero surveilled the area before pulling into the Carvel parking lot; (4) on his arrival D'Agostino said, "the pills are here", and Moskowitz stated, "That's Sal, the guy with the pills"; (5) appellant then showed Sennett, the prospective buyer, the bags which presumptively contained the pills; (6) appellant left the scene abruptly because, as D'Agostino later explained, he thought police were in the area; (7) D'Agostino, who had talked with appellant in the car immediately before the transaction, and Moskowitz both stated that the pills had been in appellant's car; and (8) after talking with appellant, D'Agostino proposed to complete the deal in another manner by bringing small quantities of pills at a time. All of these circumstances were surely sufficient for a jury to conclude beyond a reasonable doubt that methaqualone tablets were in the bags in the trunk of appellant's car.³

³ *United States v. Jones*, 308 F.2d 26, 31-33 (2d Cir. 1962), on which appellant relies, dealt with the question of whether a person who merely introduces a potential buyer to a potential supplier of illegal drugs can be convicted as an aider and abettor. Appellant Mogavero's participation was proved to be much more than that of a mere liaison.

POINT TWO

Appellant's Remaining Contentions Are Without Merit.

Appellant contends that the government did not prove beyond a reasonable doubt that Salvatore Mogavero and the November 24, 1976 drug supplier with the beard and red sweat shirt were the same person. It is further argued that the testimony of defense witnesses on such matters raised a reasonable doubt as to appellant's innocence which requires reversal of the conviction.

The government respectfully submits that these contentions have no merit. Not only did two Special Agents of the Drug Enforcement Administration unequivocally identify appellant Salvatore Mogavero as the individual who was present on November 24, 1976, but also the car driven on that occasion was admitted to have been that of appellant's wife and, following the transaction, the car was driven to appellant's home. In addition, Mogavero was circumstantially identified through co-conspirator statements identifying the November 24 supplier as "Sal."

The proof of the identity of appellant as the November 24, 1976 drug supplier was, thus, sustained by substantial evidence. See *United States v. Lamont*, Docket No. 77-1118 Slip op. 6337, 6341 (2d Cir., October 28, 1977):

It is not for a reviewing court to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). See also *United States v. Kahaner*, 317 F.2d 459, 467-468 (2d Cir.), cert. denied, 375 U.S. 836 (1963).

Appellant's arguments in this regard are merely variations of his argument that the evidence was insufficient on both counts. As we have shown, these contentions are baseless.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
December, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
RHONDA C. FIELDS,
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(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of December 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

FRANK GOELY, ESQ., 16 COURT STREET, BROOKLYN, NEW YORK 11241

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

19th day of December 19 77

Martha Scharf
MARATHA SCHARF

Notary Public, State of New York
No. 24-3480350

Qualified in Kings County
Commission Expires March 30, 19 79